

Booze: A Constitutional Anomaly?

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Alcohol has had quite an interesting history when looked at within the lens of the United States Constitution. As you scroll through the amendments, the only consumable substance mentioned is alcohol...two different times. The [Eighteenth Amendment](#) prohibited the “manufacture, sale, or transportation of intoxicating liquors.”¹ This lasted for thirteen years until Section 1 of the [Twenty-first Amendment](#) explicitly repealed the Eighteenth.² Section Two of this amendment additionally states that “transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”³ Its standing as the only consumable substance within the amendments is not the only thing that sets it apart in regard to the Constitution. Alcohol also appears to be an exceptional good to the Commerce Clause and the Privileges and Immunities Clause of the Constitution as seen in [Lebamoff v. Whitmer](#).⁴

Lebamoff Enterprises (Lebamoff), a wine retailer based in northeast Indiana (about sixty miles from the border of Michigan) along with several Michigan wine consumers filed a lawsuit against The Michigan Beer & Wine Wholesalers Association.⁵ The suit alleged that Michigan’s recently amended Liquor Control Code violates the Commerce Clause and the Privileges and Immunities Clause.⁶ The new “[law](#)” allows in-state retailers to deliver directly to consumers using state-licensed ‘third party facilitators’ or common carriers like FedEx or UPS.”⁷ This, of course, excludes out-of-state retailers, like Lebamoff, from delivering directly to consumers within Michigan.

The [Commerce Clause](#) can be found in Article 1, Section 8, Clause 3 of the U.S. Constitution and gives Congress power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”⁸ Implicit, but widely recognized, within the Commerce Clause is the Dormant Commerce Clause which “prohibits state laws that unduly restrict interstate commerce.”⁹ The Dormant Commerce Clause “directly limit[s] the States’

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¹ U.S. CONST. amend. XVIII (repealed 1933).

² U.S. CONST. amend. XXI, § 1.

³ U.S. CONST. amend. XXI, § 2.

⁴ [Lebamoff v. Whitmer](#), No. 18-2199 (6th Cir. Apr. 21, 2020) [<https://perma.cc/W5RM-KX4V>].

⁵ *Id.* at *4.

⁶ *Id.*

⁷ 2016 Mich. Pub. Acts 520, § 203(3), (15).

⁸ U.S. CONST. art. I, § 8, cl. 3.

⁹ [Tenn. Wine & Spirits Retailers Ass’n v. Thomas](#), 139 S. Ct. 2449, 2459 (2019) [<https://perma.cc/5HCU-YWY8>].

power to discriminate against interstate commerce, prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.”¹⁰ However, if the state’s law discriminates against out-of-state actors, the law can still be sustained if it is narrowly tailored to “advance[e] a legitimate local purpose.”¹¹ This is for laws which regulate all goods...but is alcohol somewhat immune to this?

The Twenty-first Amendment seems to exempt state laws regarding alcohol from the grasp of the Dormant Commerce Clause. Under this amendment, the states are granted the power to regulate commerce within their borders, when that commerce is alcohol distribution.¹² So, alcohol distribution laws are granted a “different rule” when faced with a Dormant Commerce Clause challenge.¹³ We must “ask whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground.”¹⁴

Prior to the Eighteenth Amendment, alcohol was sold by producers through “tied-house” saloons which they supplied with a building and equipment in return for the promise that they only sell their product and meet minimum sales goals.¹⁵ This meant cheap drinks for consumers.¹⁶ With these low prices, came excessive alcohol consumption followed by “addiction, crime, violence, and family troubles.”¹⁷ The Eighteenth Amendment was in place for thirteen years to try to combat the troubles brought on by the “tied house” saloons and also seemingly expanded the federal government’s role in law enforcement.¹⁸ Once the Eighteenth Amendment was repealed, discretion over alcohol regulation was placed with the states.¹⁹ Following passage of the Twenty-first Amendment, all of the states created their own system for alcohol distribution and regulation.²⁰

Michigan, like many states in this country, has a three-tier system for alcohol distribution.²¹ Producers, wholesalers, and retailers make up these tiers.²² The system has requirements and limitations of what tiers and entities can sell to others.²³ State approved producers (first tier) must sell directly to

¹⁰ *New Energy Co. v. Limbach*, 486 U.S. 269, 269 (1988) [<https://perma.cc/T747-MC9S>].

¹¹ *Oregon Waste Sys., Inc. v. Dept. of Env'tl. Quality of State of Or.*, 511 U.S. 93, 94 (1994) [<https://perma.cc/QM4X-ZRVV>].

¹² See *North Dakota v. United States*, 495 U.S. 423, 432–33 (1990) (plurality opinion) [<https://perma.cc/B4S6-QT98>].

¹³ *Tenn. Wine & Spirits*, 139 S. Ct. at 2470.

¹⁴ *Id.*

¹⁵ *Lebamoff*, No. 18-2199, at *2.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at *3.

¹⁹ *Id.*

²⁰ *Lebamoff*, No. 18-2199, at *10.

²¹ *Id.* at *3.

²² *Id.*

²³ *Id.* at *3–4.

wholesalers located within the state (second tier).²⁴ Then, these in-state wholesalers are permitted to sell only to retailers located in the state (third tier).²⁵ These in-state retailers have the exclusive right to then sell to the consumers.²⁶ Note that producers and wholesalers in Michigan may not sell directly to consumers and require in-state retailers as an intermediary.²⁷ The tiers must operate independently meaning there is no joint marketing cooperation or common ownership amongst the tiers.²⁸

So, was Michigan's law put in place as a public health or safety measure—or was it strictly protectionist? The Court has already ruled that a three-tier system for alcohol distribution is “unquestionably legitimate” under their Twenty-first Amendment rights.²⁹ This may not be the best system for an efficient market, but “efficiency is not the goal of the Twenty-first Amendment.”³⁰ Instead, the goal of the Twenty-first amendment is to allow the individual states to make choices in how they want to regulate alcohol within their own borders.³¹

The Sixth Circuit found that Michigan's law can be justified on many legitimate state interests outside of protectionist grounds.³² Michigan, like the other states, aims to promote temperance through their distribution regime.³³ The three-tier system is in place for a reason. It allows Michigan to regulate each tier closely by imposing health and safety regulations, price controls, and taxes.³⁴ The new amendment to the Liquor Control Code ensures that all alcohol which enters its borders, it can regulate.³⁵ Therefore, “Michigan ultimately controls the amount of alcohol sold within its borders.”³⁶ If *Lebamoff* was to win their challenge, the three-tier system would not function correctly.³⁷ Instead of going through the regulated Michigan wholesalers, the out-of-state retailer would be selling directly to the consumer.³⁸ Michigan could not respond to this problem by controlling prices set by out-of-state wholesalers, as this would

²⁴ *Id.* at *3.

²⁵ *Lebamoff*, No. 18-2199, at *3.

²⁶ *Id.*

²⁷ *See id.*

²⁸ *Id.*

²⁹ *Granholm v. Heald*, 544 U.S. 460, 489 (2005) [<https://perma.cc/5S48-JU3C>].

³⁰ *Lebamoff*, No. 18-2199, at *4.

³¹ *See id.*

³² *Id.* at *7.

³³ *Id.*

³⁴ *Id.* at *3.

³⁵ *Lebamoff*, No. 18-2199, at *4.

³⁶ Scott W. Coyle, *Supreme Court Denies Certiorari in Challenge to Michigan's Alcohol Delivery Law*, XI NAT'L L. REV. 1 (Jan. 13, 2021), <https://www.natlawreview.com/article/supreme-court-denies-certiorari-challenge-to-michigan-s-alcohol-delivery-law> [<https://perma.cc/EF8Z-4YUA>].

³⁷ *See Lebamoff*, No. 18-2199, at *9.

³⁸ *Id.* at *4.

violate the Extraterritoriality Doctrine which is rooted in the Dormant Commerce Clause.³⁹

The wholesaler tier in the Michigan system is absolutely crucial as it is heavily taxed.⁴⁰ This creates a higher mark-up for the alcohol than would be found in a free market.⁴¹ This is on purpose—going back to Michigan’s interest in promoting temperance and “limiting consumption” of their residents.⁴² Whenever there is a discrepancy between the free market price and a mark-up, it opens the door for outside competition to undercut prices.⁴³ Therefore, out-of-state retailers (like Lebamoff), who are not subject to the same strict regulations as in-state distributors are able to take advantage of the price discrepancy.⁴⁴ Michigan has a legitimate fear that if consumer price for alcohol is cheaper, which it presumably would be if companies like Lebamoff could undercut the price, alcohol consumption could increase.⁴⁵ Ensuring that Michigan’s alcohol distribution regulatory system stays intact is certainly a legitimate nonprotectionist ground for the amended law.

Lebamoff also claims that the law violates the Privileges and Immunities Clause.⁴⁶ The [clause](#) says “The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”⁴⁷ This clause is basically to place “the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.”⁴⁸ But [Crowley v. Christensen](#) had stated that the right to distribute was neither a privilege nor an immunity.⁴⁹ On top of this, Michigan’s law does not stop Indiana residents from opening up a physical location in Michigan, getting a Michigan retail license, and playing by Michigan’s regulatory rules.⁵⁰

In April of 2020, the Sixth Circuit decided *Lebamoff v. Whitmer* in favor of Michigan’s law.⁵¹ Three months later, a [petition for a writ of certiorari](#) was filed by Lebamoff in hopes that the Supreme Court would take the case for review.⁵²

³⁹ *Id.* at *10.

⁴⁰ *Id.* at *4.

⁴¹ *Id.*

⁴² *Lebamoff*, No. 18-2199, at *4.

⁴³ *Id.*

⁴⁴ *See id.*

⁴⁵ *Id.* at *10.

⁴⁶ *Id.* at *14.

⁴⁷ U.S. CONST. art. IV, § 2, cl. 1.

⁴⁸ *McBurney v. Young*, 569 U.S. 221, 228 (2013) (quotation omitted) [<https://perma.cc/U9A5-KNZJ>].

⁴⁹ *Crowley v. Christensen*, 137 U.S. 86, 91 (1890) [<https://perma.cc/2PEA-M6RU>].

⁵⁰ *Lebamoff*, No. 18-2199, at *14.

⁵¹ *Id.* at *1.

⁵² *Supreme Court Procedures*, UNITED STATES COURTS, <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> [<https://perma.cc/R9MK-Z8AC>] (last visited Jan. 27, 2021).

On January 11, 2021, the petition was denied. Unfortunately, the Supreme Court did not give an explanation for its denial of the petition. The Court has [discretion](#) when reviewing cases.⁵³ Denial of the petition does not necessarily mean that it agrees with the Sixth Circuit's ruling, rather it means that only three or fewer judges determined that the case warranted Supreme Court review.⁵⁴ Moving forward, the Sixth Circuit will continue to use the same standards to govern similar cases.⁵⁵

This holding means a few things. The alcohol market in states like Michigan with a strict three-tier system will be less competitive. The market will be an insulated bubble preventing out-of-state retailers from entering it. Without this outside competition fighting for market share, in-state retailers will be able to corner the market and keep their prices up. If the borders were truly open, out-of-state retailers could come in without the regulatory burden of the state and undercut prices—something consumers would certainly be happy about, but which would put a dent into the function of the tiered system. Out-of-state retailers who aren't able to freely work within neighboring states will be affected. However, as mentioned earlier, if they want to operate within the state, they can work within that state's regulatory framework to do so. Obviously, this isn't ideal for consumers, but given the nature of alcohol's history in America and the states' discretion over it, this clearly can be seen as justified through health and safety measures. *Lebamoff* was decided correctly due to alcohol's status as the only consumable substance mentioned explicitly in the Constitution, the states' rights to regulate alcohol for health and safety reasons, and alcohol's longstanding history in this country. Therefore, alcohol is a justified exemption to the Dormant Commerce Clause.

⁵³ *Certiorari*, CORNELL LAW SCHOOL: LEGAL INFO. INST. <https://www.law.cornell.edu/wex/certiorari#:~:text=The%20Court's%20orders%20granting%20or,However%2C%20in%20Maryland%20v> [https://perma.cc/G6K9-2YFD] (last visited Jan. 27, 2021).

⁵⁴ *Id.*

⁵⁵ Coyle, *supra* note 36.